IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

~~No. 1087~~ 70-153

UNITED STATES OF AMERICA,

*Petitioner,*

—v.—

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, and HON. DAMON J. KEITH.

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HUGH M. DAVIS, JR.
715 E. Grand Blvd.
Detroit, Michigan 48207

LEONARD I. WEINGLASS
43 Bleeker Street
Newark, New Jersey 07102

WILLIAM M. KUNSTLER
ARTHUR KINOY
MORTON STAVIS
Center for Constitutional Rights
588 Ninth Avenue
New York, New York 10036

*Of Counsel:*

MARK STICKGOLD
726 Pallistar
Detroit, Michigan

JUSTIN RAVITZ
2761 E. Jefferson
Detroit, Michigan

RICHARD S. MCMILLIN
715 E. Grand Blvd.
Detroit, Michigan

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 1687

UNITED STATES OF AMERICA,

*Petitioner,*

—v.—

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, AND HON. DAMON J. KEITH.

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

This case arose out of a criminal proceeding pending trial in the United States District Court for the Eastern District of Michigan in which the three defendants therein are charged with a conspiracy to destroy government property in violation of 18 U.S.C. 371, and one of the defendants, namely, Lawrence Robert "Pun" Plamondon, with the destruction of government property in violation of 18 U.S.C. 1361. On or about October 5, 1970, said defendants moved respondent Hon. Damon J. Keith, United States District Judge for the Eastern District of Michigan, Southern Division, for an order compelling petitioner to disclose to them, *inter alia*, "any and all logs, records, and memoranda of any electronic or other surveillance directed at any of the defendants herein or at unindicted co-conspirators herein, or conducted at or upon or directed at

premises of any defendant or unindicted co-conspirator herein . . . . " On or about December 16, 1970, petitioner filed with Judge Keith a "Memorandum Relating to Electronic Surveillance," accompanied by an affidavit of the Attorney General of the United States, in opposition to defendants' said motion for disclosure of electronic surveillance information. At the same time, petitioner also filed a sealed exhibit containing the records of intercepted conversations of defendant Plamondon, a description of the premises which were the subjects of the surveillances, and copies of the memoranda reflecting the Attorney General's express approval of the surveillances.*

In essence, the position of petitioner was that such surveillance was lawful in that the wiretaps which resulted in the overhearings contained in the sealed exhibit "were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domicile organizations to attack and subvert the existing structure of the Government." (Petition for Writ of Certiorari, p. 12) It was—and is—petitioner's position that such electronic surveillance is reasonable within the meaning of the Fourth Amendment "when it has been specifically authorized by the President, acting through the Attorney General, to gather intelligence information deemed necessary to protect against attempts to overthrow the Government by force or other unlawful means or against other clear and present dangers to the government's structure or existence." (*Ibid.*, p. 2) In addition, petitioner claimed below that the unrestricted employment of Presidential power to wiretap rested upon the inherent powers of the President as Chief

*This sealed exhibit is part of the record before this Court.

of State to defend the existence of the State (App. A, pp. 35-36), a contention that has apparently now been dropped by the Government.

On January 25, 1971, Judge Keith held that "the contention of the Attorney General is in error; it is supported neither historically, nor by the language of the Omnibus Crime Act. Such power held by one individual was never contemplated by the framers of our Constitution and cannot be tolerated today." (App. B, p. 72) Accordingly, Judge Keith ordered the Government "to make full disclosure to defendant Plamondon of his monitored conversations." (*Ibid.*) On or about February 4, 1971, defendants renewed in writing a motion, orally made in open court a week earlier, to dismiss the indictment on the ground that petitioner had failed to comply with the said order of the district court to disclose the intercepted material. To date, no action has been taken on said motion.*

Subsequently, petitioner filed in the United States Court of Appeals for the Sixth Circuit a petition for a writ of mandamus to set aside the said order of the district court requiring "full disclosure to defendant Plamondon of his monitored conversations." While agreeing that the case was an appropriate one for mandamus, the court of appeals, in denying the petition, held "that the district judge properly found that the conversations of defendant Plamondon were illegally intercepted, and we cannot hold that his dis-

* This motion was mooted by the subsequent issuance of a stay of execution of Judge Keith's disclosure order by the court of appeals. Following the denial of petitioner's application for a writ of mandamus, *infra*, defendants moved for a hearing on and decision of the motion of February 4, 1971, but this motion, too, was at least temporarily mooted on May 10, 1971, by an order of the court of appeals staying its mandate up to and including May 29, 1971.

closure order (as interpreted below) is an abuse of judicial discretion.". (App. A, p. 44) On May 8, 1971, the Solicitor General applied for a writ of certiorari to review the said judgment of denial.

Defendants most strenuously oppose the granting of the writ of certiorari sought by petitioner. They do so on the ground that the reasons set forth by the court of appeals in the opinion accompanying its order denying the petition for a writ of mandamus are clearly and consistently correct. As its majority stated in their careful and exhaustive opinion, "we have found no . . . specific constitutional authority to disregard the Fourth Amendment in domestic security cases like this one." (*Ibid.*, at 40)*

However, should this Court, in the exercise of its discretion, decide to grant the requested writ of certiorari, defendants request that argument be scheduled during the October Term, 1970. In the event that scheduling difficulties make it impracticable for argument to be heard during said term, it is respectfully urged that this Court convene in Special Term for this purpose. *Rosenberg, et al.* v. *United States*, 346 U.S. 273.

---

* In addition to its Fourth Amendment arguments, petitioner raises here for the first time its dissatisfaction with the automatic disclosure requirement mandated by *Alderman* v. *United States*, 394 U.S. 165, and suggests that it is "inappropriate and unnecessary in a case such as the present one." (Petition for Certiorari, p. 8) It insists that a defendant's Fourth Amendment rights would be adequately protected by the district court's *in camera* inspection of unlawful interceptions "to determine whether they are arguably relevant to the prosecution before directing that they be disclosed to the defendant, withholding those that the court can satisfy itself are not arguably relevant. Cf. *Taglianetti* v. *United States*, 394 U.S. 316, *ibid.*," a position expressly rejected by this Court in *Alderman*.

Defendants make this urgent request because they feel that this "extraordinary case" (App. A, p. 15) contains, as the court of appeals so emphatically stressed "[G]reat issues [which] are at stake for all parties concerned." (*Ibid.*) But these "great issues" are hardly confined to that "of the President's authority to order warrantless electronic surveillances in national security cases . . . ." (Petition for Certiorari, p. 5) What is really involved here is the startling and horrifying possibility that our national community may be on the verge of rejecting its most fundamental democratic ideals in favor of the fearsome restrictions of a repressive fascist-like state.

On every side, we see the steadily mounting evidence of the impending destruction of those rights and liberties which the Framers were so convinced would create, sustain and perpetuate on these shores a free and open society unlike any other on the face of the globe. The denial of bail, preventive detention, the plethora of "no knock" and "stop and frisk" statutes, the apparently unlimited surveillance of everyone from Boy Scouts to Congressmen, the creation and maintenance of millions of dossiers on private citizens, the sanctification of the informer and the infiltrator, the wide use of unprovable and outlandish conspiracy prosecutions, the tacit or active approval of official and private violence against peaceful political dissidents, the vilification of those who dare to differ publicly with their government and the relentless attempts to intimidate and undermine news media critical of its practices and policies—these are but a handful of the unmistakable indicia of a nation in the beginning throes of a catastrophic transition from freedom to bondage. No issue could possibly be

greater or of more compelling moment than that of a free people, in fear and desperation, being stampeded into the ready acceptance of the trappings of a totalitarian state with all that that tragic designation implies.

Concededly, warrantless electronic surveillance is but one example of the rapidly spreading neo-fascism that is threatening to destroy us as a community of free people. But it illustrates, in dramatic fashion, the spectacle of men in high places vociferously demanding the paradoxical power to save freedom by destroying its most precious concepts. In this area alone, the rampant invasion of our Fourth Amendment safeguards has so seriously shaken the confidence of millions of Americans, be they public or private, in the sanctity of their telephonic communications that no one, consciously or subliminally, can be sure that there is not a third ear present at every such conversation.

Under such circumstances, the free and unrestricted interchange of ideas, the lifeblood of a progressive society, are seriously inhibited and the First Amendment is in great danger of becoming a casualty of the destruction of the Fourth.* Only the immediate intervention of this Court can serve notice upon all concerned that this "dirty business"** shall cease forthwith and, along with it, every related threat, overt or covert, to the existence of our nation as its Founders so fervently envisioned it to be.

It can never be forgotten, even for a moment, that liberty is rarely lost overnight but by the cumulative effect of a succession of disregarded affronts. As one lead-

---

* Or, as the court of appeals put it, "Beyond doubt, the First Amendment is the cornerstone of American freedom. The Fourth Amendment stands as guardian of the First." (App. A, p. 37)

** *Olmstead* v. *United States*, 277 U.S. 438, 575.

ing newspaper so eloquently and pointedly editorialized in commenting recently on the very issue before this Court, "Tyranny, like fog, can come creeping in on cat's feet. It comes little by little, chipping away at this freedom and chivvying that right. It adopts the habits and practices of a police state while blandly assuring everyone that no police state exists. It intimidates in the name of 'fairness' and denies that conformity and obedience are what are really desired." (*The New York Times,* May 2, 1971, Section 4, p. 14) To ignore this warning is to court the dark whirlwind that, in 1933, overwhelmed first the Weimar Republic, and then three-quarters of the world.

It hardly seems necessary to point out that the very same "great issues" elaborated below are present in serious federal criminal prosecutions and/or appeals currently pending in other district courts and courts of appeal.* In the event of a decision by this Court to review the determination of the court of appeals, it would also seem to be in the best interests of all parties in the within prosecution,** as well as in those pending in other jurisdictions, to obtain a swift and final determination of this bedrock issue.

Therefore, the petition for certiorari should be denied or, if granted, this appeal heard and decided during the

---

* *E.g.*, see, *United States* v. *Dellinger, et al.* (CA 7, No. 18,295); *United States* v. *Brown* (CA 5, Nos. 26,249 and 30,405); *United States* v. *Smith* (CA 9, No. 71-1378); *United States* v. *Ahmad, et al.* (M.D. Pa., Ind. No. 14886); and *United States* v. *Marshall, et al.* (W.D. Wash., No. 51942). See also the recent decision of the Third Circuit in *Egan* v. *United States,* No. 71-1088 (~~March 2,~~ May 19, 1971), review of which will most certainly be sought in this Court.

** All of the defendants herein are presently in custody and a swift resolution of this case would, of course, have important ramifications for them.

October Term, 1970, or, in the alternative, at a Special Term of this Court.

Respectfully submitted,

HUGH M. DAVIS, JR.
715 E. Grand Blvd.
Detroit, Michigan 48207

LEONARD I. WEINGLASS
43 Bleeker Street
Newark, New Jersey 07102

WILLIAM M. KUNSTLER
ARTHUR KINOY
MORTON STAVIS
Center for Constitutional Rights
588 Ninth Avenue
New York, New York 10036

*Of Counsel*:

MARK STICKGOLD
726 Pallister
Detroit, Michigan

JUSTIN RAVITZ
2761 E. Jefferson
Detroit, Michigan

RICHARD S. MCMILLIN
715 E. Grand Blvd.
Detroit, Michigan

Dated: June 2, 1971